

STATE OF MICHIGAN
COURT OF APPEALS

FRANK R. HAYGOOD,

Plaintiff-Appellant,

v

THE SALVATION ARMY,

Defendant-Appellee,

and

TOM TUPPENNEY,

Defendant.

UNPUBLISHED

October 11, 2005

No. 253881

Wayne Circuit Court

LC No. 02-235265-CK

Before: Hood, P.J., and White and O'Connell, JJ.

WHITE, J. (*concurring.*)

I agree that summary disposition was properly granted, for a slightly different reason than the majority.

Plaintiff was the Human Resources Director for defendant. Plaintiff submitted below an affidavit stating that around 1992, he began a dating relationship with a secretary/office manager employed by defendant, and had an on-again off-again dating relationship with her for approximately 8 years. Plaintiff's affidavit stated that his wife passed away in May of 2000, and that his then-lover started pressuring him to marry her in December 2000, but he declined. His affidavit states that this lover married another man in April of 2001. The affidavit further states that plaintiff spoke with Major Tuppenney in April 2001 and told him that he, plaintiff, was contemplating a possible dating relationship with another female employee of defendant. Plaintiff's affidavit states that he asked Tuppenney that the woman be transferred to a different department than plaintiff's and that Tuppenney seemed to agree that that was a good idea.

The affidavit states that plaintiff learned in May of 2001, that his first employee-lover had made allegations of sexual harassment against him. Plaintiff's affidavit states that at that time, Major Tuppenney told him that he was on a paid suspension while defendant investigated the sexual harassment claim. Finally, plaintiff's affidavit states that he met with Major Tuppenney in July 2001, at which time Tuppenney told plaintiff that defendant had not found evidence of sexual harassment, but that "because I was involved in a dating relationship with [the

second female employee], that Major Tuppenney had decided to terminate my employment. Plaintiff's affidavit ends by stating:

"I then asked why my situation was different than that of Linda Powell who had dated Donald Berry when Ms. Powell was his direct supervisor and why it was different from a female nursing supervisor in the Macomb County office who had a dating relationship with a client and why I was being treated differently. Major Tuppenney told me that my situation was different because I was a man."

Plaintiff asserts that that this last remark of Major Tuppenney's, "because you're a man," constitutes direct evidence of reverse gender discrimination.

The requisites of presenting direct evidence in cases such as this were discussed in *Sniecinski v Blue Cross and Blue Shield of Michigan*, 469 Mich 124, 133; 666 NW2d 186 (2003):

In a direct evidence case involving mixed motives, i.e., where the adverse employment decision could have been based on both legitimate and legally impermissible reasons, a plaintiff must prove that the defendant's discriminatory animus was more likely than not a "substantial" or "motivating" factor in the decision. *Price Waterhouse v Hopkins*, 490 US 228, 244; 109 S Ct 1775; 104 L Ed 2d (1989); *Harrison [v Olde Financial Corp]*, 225 Mich App 601, 612-613; 572 NW2d 679 (1997)]. In addition, a plaintiff must establish her qualification or other eligibility for the position sought and present direct proof that the discriminatory animus was causally related to the adverse decision. *Harrison, supra* at 612-613. Stated another way, a defendant may avoid a finding of liability by proving that it would have made the same decision even if the impermissible consideration had not played a role in the decision. *Price Waterhouse, supra* at 244-245.

I conclude that the statement "because you're a man" would be direct evidence of some sort of animus, except that it is belied by everything in the record. That is, there is no allegation or showing that defendant generally discriminates against men; the record is clear that defendant employs many men and has retained several men after they had had affairs (including plaintiff, after his first affair with a subordinate). The female that plaintiff asserts was treated more favorably than he, was a supervisor of facilities and not of personnel, and she married the subordinate she had dated in 1999, several years before plaintiff was terminated. In contrast, once plaintiff began a second intimate relationship with a subordinate, his first employee-lover complained he had sexually harassed her, and there is record evidence that plaintiff's first lover fought with the second lover in the workplace, regarding plaintiff.

Even viewing the challenged remark as direct evidence of discriminatory animus on the part of Major Tuppenney, I conclude that given the overwhelming, uncontradicted evidence that plaintiff engaged in intimate relationships with his subordinates and was terminated therefor, there was no genuine issue of fact whether defendant would have terminated plaintiff even had his gender not played a role in the decision to terminate him.

/s/ Helene N. White